IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-235

RONALD G. POLLY,
Petitioner

vs.

HOWELL CORPORATION AND LAKE COAL CO., INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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R.A. — Respondents' Appendix

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STATUTE INVOLVED IN THE CASE

28 U.S.C. § 1291 (Am. 1982)

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The Jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

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*This disclosure is made pursuant to Rule 28.1 of the Supreme Court Rules. Respondent Howell Corporation is the parent company of numerous wholly owned subsidiaries of which Lake Coal Co., Inc. was one. The only subsidiary of Howell Corporation which is not wholly owned is an inactive corporation by the name of Howell Microtech, Inc.

STATMENT OF THE CASE

This appeal arises out of a Kentucky district court order which merely allowed Respondents to take the deposition of a nonparty, Petitioner Ronald Polly, in a civil case originally filed in Houston, Texas. (P.A. 5a - 9a). Respondents are Plaintiffs in the main suit filed against John Innes, a former officer and employee. The main action, filed in Houston in March of 1987, is based upon allegations that Innes accepted bribes and kick-backs during his employment. (P.A. 8a).

On June 30, 1987, Respondents caused a subpoena to be issued by the clerk of the Eastern District of Kentucky to take the deposition of Ronald Polly, a resident of Whitesburg, Kentucky. Innes filed a motion to quash the deposition of Ronald Polly (and others) in the district court in Houston claiming that the deposition notices were premature and harassing because of a pending motion to dismiss. (R.A.3a). The Houston district court denied Innes' motion. (R.A.3a). Mr. Polly then filed a motion for protection in the Eastern District of Kentucky urging similar grounds. The Kentucky district court preliminarily stayed Mr. Polly's deposition awaiting a ruling on a motion to dismiss pending in the Houston district court. After the Houston court denied the motion to dismiss, Polly sought a continued stay of the deposition due to a pending motion to transfer venue. The Kentucky court continued the stay by order dated October 20, 1987. (P.A. 5a - 9a).

In February of 1988, Howell and Lake asked the Kentucky court to reconsider the stay based on several facts. First, the scheduling order of the Houston court required that all discovery be completed prior to June 1, 1988. Second, the necessity to depose Mr. Polly was reiterated. Innes' counsel had disclosed in an affidavit that Mr. Polly was likely to be called as a witness for the defense. The affidavit further revealed that Mr. Polly had acted as advisory counsel to Innes. The record also established that, prior to the litigation, Mr. Polly had served as counsel for Howell and Lake. Finally, the court was advised of the fact that Innes had filed an original action against Howell and Lake in Kentucky as well as a counterclaim in the Houston action. (P.A. 5a - 9a).

In granting the motion to reconsider the Kentucky court stated that, due to Mr. Polly's "association with these parties, the court is of the opinion that under FRCivP 26, Howell Corporation is entitled to take discovery from Ronald Polly . . ." The order of the court was entered on June 24, 1988.

On June 29, 1988, the Houston court, pursuant to motion by John Innes, transferred the main case to the Eastern District of Kentucky. (R.A. 1a). Nevertheless, on July 21, 1988 Mr. Polly filed a notice of appeal of the deposition order of the Kentucky court. On March 22, 1989 the Sixth Circuit dismissed the appeal for lack of appellate jurisdiction. (P.A. 1a). The petition for rehearing was denied by Order dated April 21, 1989. (P.A. 2a). Petitioner claims that the Sixth Circuit erred in dismissing the appeal for lack of jurisdiction.

Meanwhile, Respondents have continued in their efforts to complete discovery in the case now pending in the Eastern District of Kentucky. Mr. Polly was again subpoenaed for deposition and again resisted. Mr. Polly's motion was again denied. The magistrate appointed to resolve pretrial matters issued his opinion dated August 10, 1989 which: (1) denied Mr. Polly's motion to impose sanctions under Rules 11 and 26; (2) denied Mr. Polly's request to quash the deposition subpoena and subpoena *duces tecum;* and (3) denied Mr. Polly's request for a protective order. (R.A.6a). Mr. Polly has filed objections to the magistrate's order.

SUMMARY OF ARGUMENT

No issues are presented in the Petition which present unique or important questions sufficient to justify this Court expending its time and resources. Petitioner, a material witness, so designated by the Defendant and Counterclaimant in the main case, has simply been ordered to comply with legitimate discovery attempts by Respondents.

The discovery order, which is the subject of this Petition and which the Sixth Circuit ruled was non-appealable and interlocutory, was entered in the Eastern District of Kentucky on June 24, 1988. On June 29, 1988 the main case was transferred from Houston, Texas to the Eastern District of Kentucky. Peti-

tioner's notice of appeal of the discovery order was filed on July 21, 1988. The Sixth Circuit correctly held that, under the facts of this case, the discovery order was a non-appealable interlocutory order because Petitioner has effective review of the order to the Sixth Circuit on appeal of the main case.

ARGUMENT

No special and important reasons exist for granting this writ of certiorari. Petitioner's efforts to resist discovery have already been granted status and review far beyond any argument of merit. The order of the district court was non-appealable because the main case was pending in the same district at the time the notice of appeal was filed. Petitioner can clearly obtain full and complete review of the discovery order from the Sixth Circuit at the time of appeal of the main case. No justification exists to create an exception to the rule that interlocutory discovery orders are non-appealable.

Petitioner claims that jurisdiction over his appeal to the Sixth Circuit was founded on 28 U.S.C. § 1291. This statute states that the courts of appeals have jurisdiction of appeals from "all final decisions of the district courts . . ." Generally, orders regarding discovery are deemed interlocutory and reviewable only upon appeal from a final judgment. *United States v. Nixon,* 418 U.S. 683, 690-91, 94 S.Ct. 3090, 3098-99, 41 L.Ed. 2d 1039 (1974). The Court recognizes that the finality requirement of 28 U.S.C. § 1291 has embodied within it "a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *United States v. Nixon,* 418 U.S. at 690, 94 S.Ct. at 3099. This is not to imply, however, that only final judgments may be appealed.

The Court has recognized a small class of decisions which are excepted from the final judgment rule of section 1291. Known as the collateral order doctrine, such an order must meet stringent prerequisites to fall within the exception. The order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the main action; and (3) be unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed. 2d 351 (1978); *Abney v. United States,* 431 U.S. 651, 658, 97 S.Ct. 2034, 2039, 52 L.Ed. 2d 651 (1977); *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528(1949).

Each of the three requirements must be satisfied to meet the exception. In this case, it is unnecessary to determine whether Petitioner has demonstrated or can demonstrate satisfaction of the first and second requirements, because it is immediately apparent that Petitioner cannot meet the third requirement. The Sixth Circuit correctly dismissed the appeal for lack of appellate jurisdiction because the order complained of by Mr. Polly is clearly reviewable by the Sixth Circuit upon appeal of a final judgment in the main case. The Sixth Circuit will have appellate jurisdiction of the case on the merits which is pending in the United States District Court for Eastern District of Kentucky at Pikeville, the same district that issued the order which Mr. Polly sought to appeal.

Several circuit courts have ruled that even a discovery decision issued by a district court **different** from the court on the merits is a non-appealable interlocutory discovery order. These rulings rest on the fact that the order can be reviewed by the circuit court on the appeal of the merits of the case. In *Barric Group, Inc. v. Mosse,* 849 F.2d 70, 72 (2d Cir. 1988), the court reiterated the general rule that orders denying or compelling discovery are non-appealable because they can be reviewed effectively on appeals from the final judgments. The court held that where the ancillary proceeding and the main proceeding are in different district courts, but in the same circuit, there is no jurisdiction over the appeal of the discovery order. *Barrick Group, Inc.,* 849 F.2d at 73; *See also, In re Subpoena Served on California PUC,* 813 F.2d 1473, 1476-79 (9th Cir. 1987), and *United States v. James T. Barnes and Company,* 758 F.2d 146 (6th Cir. 1985). Application of the general rule to this case can only be more forceful when the main case and the ancillary proceeding are in the same district at the time of filing of the notice of appeal.

The fact that the order transferring the main case to the Eastern District of Kentucky was not before the district court at the time of discovery order is of no consequence. Appellate jurisdiction is initially determined on the date the notice of appeal is filed. *Lamp v. Andrus,* 657 F.2d 1167, 1169 (10th Cir. 1981). The order transferring the main case to the Eastern Distict of Kentucky was entered prior to the filing of Mr. Polly's notice of appeal. The appellate court is required to address a jurisdictional issue anytime such is brought to its attention. Courts must consider all facts and events that are brought to their attention, by whatever manner, even during the appeal, that may affect its jurisdiction. *See, International Union, U.A.W. v. Telex Computer Products, Inc.,* 816 F.2d 519, 521-22 (10th Cir. 1987) and authorities cited therein. Once the Sixth Circuit Court was advised of the transfer of the main case to the Eastern District of Kentucky, it was required to dismiss the appeal for lack of jurisdiction.

There are only two circuit court decisions which even arguably permit an appeal from an ancillary order of a district court that is located in the same circuit that would review the main case on appeal. *See, Heat and Control, Inc. v. Hester Industries, Inc.,* 785 F.2d 1017 (Fed. Cir. 1986) and *Ariel v. Jones,* 693 F.2d 1058 (11th Cir. 1982). Both cases are distinguishable from the instant case. First, the orders were issued out of district courts different than the main case. In the present situation the ancillary order was issued out of the same district that now has the main case. In *Heat and Control, Inc.* the main case was in district court in California and the ancillary order arose out of West Virginia. The main action involved a patent dispute, however, giving the federal circuit court appellate jurisdiction over the final decision of the California district court. 28 U.S.C. § 1295 (1). The case is further distinguished by virtue of the Federal Circuit Court's finding that the main court did not have jurisdiction over the subpoenaed nonparty and, thus, there could be no effective review of the ancillary court's discovery order. *Heat and Control, Inc.* 785 F.2d at 1021. There is no jurisdictional question in this case, and Petitioner has a means for effective review.

Without analysis, the Eleventh Circuit in *Ariel* simply held that the discovery order was appealable. In its opinion, the court

cited four decisions which allegedly supported its conclusion. Each case cited, however, only allowed appeals of ancillary discovery orders issued by district courts sitting in circuits other than the main case district court.[1] These cases correctly recognize that the appellant had no effective review of the ancillary orders, because it could not be reviewed by the circuit court on appeal of the main case. Therefore, the third element of the collateral doctrine was met and the order was appealable.

Such is admittedly not the case in the matter before the Court. The order was issued by the district court, which, at the time Petitioner sought to invoke the jurisdiction of the Sixth Circuit, was the same district where the main action was pending. The Sixth Circuit correctly held that it had no jurisdiction over the appeal of the discovery order.

CONCLUSION

Respondents respectfully submit that there is no merit to the petition for writ of certiorari and it should not be allowed.

Respectfully submitted,

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[1]The cases cited were *National Life Ins. Co. v. Hartford Accident and Indemnity Co.*, 615 F.2d 595 (3d Cir. 1980) (review of nonparty discovery order out of a district court in the Third Circuit, main action pending in the Fifth Circuit); *Republic Gear Co. v. Borg Warner.*, 381 F.2d 551 (2d Cir. 1967) (review of discovery order of district court in the Second Circuit relating to action pending in the Seventh Circuit); *Gladrow v. Weisz*, 354 F. 2d 464 (5th Cir. 1965) (review of discovery order to nonparty in the Fifth Circuit relating to pending action in United States Patent Office); *Horizons Titanium Corp. v. Norton Co.*, 290 F.2d 421 (1st Cir. 1961) (review of discovery order in the First Circuit relating to main action pending in the District of Columbia).

RESPONDENTS' APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOWELL CORPORTATION and LAKE COAL CO., INC., Plaintiffs	x	
v.	x	Civil Action H-87-963
JOHN INNES, Defendant	x	

ORDER

Pending before this Court is Defendant's Motion to Transfer Civil Action to Eastern District of Kentucky Pursuant to 28 U.S.C. § 1404 (a) (Document #49). Having considered the motion, the memoranda in support and opposition, the argument of counsel, and the applicable law, it is

ORDERED that Defandant's Motion to Transfer Civil Action to Eastern District of Kentucky Pursuant to 28 U.S.C. § 1404 (a) be, and is hereby, GRANTED. It is further

ORDERED that this case be, and is hereby, TRANSFERRED to the Eastern District of Kentucky.

SIGNED at Houston, Texas, on this 29th day of June, 1988.

DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CONSOLIDATED CIVIL ACTION
Nos. 88-255
and
87-284

HOWELL CORPORTATION, ET AL., ... PLAINTIFFS
COUNTERCLAIM DEFENDANTS

vs. **ORDER**

JOHN J. INNES, ... DEFENDANT AND
COUNTERCLAIM PLAINTIFF

Motions to impose sanctions under Rule 11, Fed. R. Civ. P., and Rule 26 (g), Fed. R. Civ. P., to quash a deposition subpeona and subpeona *duces tecum,* and for a protective order have been filed by Ronald G. Polly [Polly]. [Record No. 94]. The motions have been fully briefed by the parties and are before the undersigned for consideration. 28 U.S.C. § 636 (b) (1) (A).[1]

Polly, a former attorney for parties Howell Corporation [Howell] and John J. Innes [Innes], is not a party to this action. His name, however, was metioned in the complaint filed by Howell and Lake Coal Corporation [Lake] against Innes. Howell and Lake have long sought to obtain Polly's deposition in this matter and, on June 26, 1989, served a notice of deposition and a subpeona *duces tecum* on the Polly. [Record No. 191]. As a result, Polly claims abuse of discovery under Rule 26 (g) because such a deposition furthers the abuses against him set forth in the complaint.

[1]This action was referred to the undersigned for the disposition of a variety of pending discovery motions and motions for summary judgment. [Record Nos. 185 and 189]. Judge Forester deferred all motions for sanctions pending at the time of referral until the final disposition of the case. Polly's motion was filed subsequent to the referral to the undersigned. Because of the relief sought by the motion, the matter was then referred to the undersigned. [Record No. 196].

Polly maintains that the allegations in the complaint accuse him, without any factual or legal basis, of being a co-conspirator with Innes in a pattern of fraud, kickbacks, bribery, and other criminal activity. He urges the court to find that the complaint was written maliciously and without an adequate pre-filing factual investigation in violation of Rule 11. As a sanction for the alleged Rule 11 violation, and by the motions to quash and motion for protective order, Polly seeks a court order prohibiting the Howell Corporation from taking his deposition.

Howell and Lake, along with parties Vennis Watts, Rudolph Williams, Forrest Cook, and the law firm of Cook, Wright & Taylor, all responded that they believe Polly has critical information regarding the facts at issue in this case. In fact, *two* federal judges have held that Polly must submit to depositions by these parties. *Howell Corp., et al. v. Innes, No. 88-255,* (S.D. Tex. July 1, 1987) [Record No. 34;] *Howell Corp., et al. v. Innes,* No. 87-206, (E.D. Ky. June 23, 1988) [Record Nos. 26 and 27].

As Polly points out, he was not a party to the Texas motion and the ruling did not directly address the arguments raised in these motions. The Texas court motion was made by Innes on the ground that any depositions at that point were premature due to a pending motion to dismiss. The judge denied the motion to dismiss and ordered discovery to proceed.

The June 23, 1988 motion, however, directly addressed the propriety of Polly's deposition. Five days after the Texas court ruling, Polly filed a motion to quash his subpeona and to prohibit the taking of his deposition on the exact grounds raised in the motion now before the court. Judge Reed stayed the taking of Polly's deposition until after certain motions in the case were resolved.[2] The stay was lifted a year later upon reconsideration of the motion at the request of Howell and Lake.

In his June 23, 1988 memorandum opinion, Judge Reed pointed out that the record indicated Polly had acted as counsel for both Howell and Innes and that it was alleged that Howell may have discharged Polly because of conflict of interest. Further, he cited the complaint's charges that Polly acted in concert

[2]At that time, that case was still in the U.S. District Court for the Southern District of Texas.

with Innes in the alleged criminal activity. Judge Reed concluded:

> In light of this background, the court is of the opinion that Mr. Polly 'doth protest too much.' Mr. Polly may very well be completely innocent of all charges lodged against him in the Texas action; however, his involvement or lack thereof in relation to this alleged RICO activity is not the point. The point is that since he has apparently been counsel to both Howell Corporation and John J. Innes, it only stands to reason that he may have information and knowledge relevant to the Texas action. Due to his association with these parties, the court is of the opinion that under FRCivP 26, Howell Corporation is entitled to take discovery from Ronald G. Polly . . . .

Howell, No. 87-206, memorandum op. at 5 [Record No. 26].

Polly's appeal of this ruling to the Sixth Circuit was dismissed *sua sponte* at oral argument as having been taken from an interlocutory order. He informs the court that he has filed a petition for writ of certiorari in the United States Supreme Court.

While the prior motions were made solely under Rule 26, this attempt to thwart his deposition travels an indirect route through Rule 11. To escape Judge Reed's analysis, Polly urges that the complaint itself is abusive and improper.

A threshold issue, though not touched upon by the parties, is whether Polly, as a non-party, has standing to move for Rule 11 sanctions. The language of the rule and commentary of the drafters make clear that sanctions may be imposed on any person signing pleadings which are improper under the rule. However, in the opinion of the undersigned, there is no indication that the mere mention of a person's name in a complaint causes that non-party to directly incur expense or that directly results in the expenditure of court resources. *Contra Greenburg v. Sala,* 822 F.2d 882, 885 (9th Cir. 1987).

In *Greenburg,* the movants were named as parties to the complaint at issue, but they were never served and were dismissed. The court cited *Westmoreland v. CBS, Inc.,* 770 F.2d 1168 (D.C. Cir. 1985), as authority for the proposition that non-party witnesses are entitled to seek Rule 11 sanctions. The court in *Westmoreland* had imposed sanctions based on the motion of a non-party witness without discussion of his standing to make

such a motion. Also, the witness in *Westmoreland* moved for sanctions stemming from improper pleadings involving only his deposition, not the complaint as a whole. While, arguably, that type of pleading abuse directly offends the non-party deponent, resulting in expense to the non-party and direct consumption of court resources, it seems a more appropriate remedy for the non-party lies in Rule 26(g) rather than Rule 11.

The undersigned could locate nodefinitive authority on this question as it relates to the situation presented by Polly. Though the resolution of this issue could seriously affect the subject motions, a more certain factor in a Rule 11 analysis forces the undersigned to leave the question of standing for scholarly debate.

Assuming Polly has standing to move for sanctions under Rule 11, "the court must consider whether the party has acted promptly to bring a violation of Rule 11 to the court's attention." *Jackson v. Law Firm of O'Hara, Ruberg, Osborne, and Taylor,* 875 F.2d 1224, 1230 (6th Cir. 1989). The moving party must mitigate any damages by acting promptly and avoiding any unnecessary expenses in responding to papers that violate the rule. *Id.*

The *Jackson* court's discussion of timeliness involved the calculation of attorney's fees awardable as sanctions. However, the goals of Rule 11 mandate that timeliness be considered in the propriety of any sanction under the rule. Those goals are "the deterrence and punishment of offenders and the compensation of their opponents for expenditure of time and resources responding to unreasonable pleadings or motions" *INVST Financial Group v. Chem-Nuclear Systems,* 815 F.2d 391, 404 (6th Cir. 1987).

Here, Polly urges a bar to the taking of his deposition as a deterrent to the allegedly improper conduct of Howell and Lake by their complaint. However, Polly has chosen to drag this matter out for two years and to propageate the expenditure of considerable court time (including that of the United States Supreme Court) before deciding that he would broadside the complaint as a whole. In light of the extent to which he has taken the discovery ruling by Judge Reed, this Rule 11 motion is clearly an afterthought. The extensive delay and alternative proceedings caused by Polly preclude an award of sanctions.

Moreover, the factors cited by Judge Reed in his memoran-

Moreover, the factors cited by Judge Reed in his memorandum opinion make clear that there is a strong likelihood that Polly possesses informaton vital to the parties in this case. As the judge so adeptly stated, Polly "doth protest too much." At this juncture, it is impossible to simply take Polly's word that the charges have no basis in fact.

The deposition Polly wishes to bar is actually an important element toward any determination that sanctions are warranted. The information to be provided, or the lack thereof, will certainly have a bearing on the substance of the allegations stated in the complaint of Howell and Lake. The absence of information contrary to those charges frustrates the conclusion Polly finds so obvious.

Accordingly,

IT IS ORDERED that the motions of Ronald G. Polly to impose sanctions under Rules 11 and 26(g), to quash his deposition subpeona and subpeona *duces tecum,* and for protective order be and same hereby are, DENIED.

This the 10th day of August, 1989.

JOSEPH M. HOOD
United State Magistrate